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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-358

UNITED STATES OF AMERICA
ex rel. WILLIAM EPTON,

Petitioner,

against

ALBERT NENNA, Warden, Manhattan House of Detention for Men,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 71-358

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,
Petitioner,

against

ALBERT NENNA, Warden, Manhattan House of Detention for Men,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner's Previous Application to This Court

William Epton's petition for a writ of certiorari to review the affirmance of his judgment of conviction by the New York Court of Appeals was denied, and his appeal was dismissed for want of a substantial federal question. 390 U.S. 29 (DOUGLAS, J., dissenting), *rehearing denied,* 390 U.S. 976 (1968). His motion for leave to file a petition for rehearing out of time was denied. 398 U.S. 944 (1970).

Opinions Below

The opinion of the district court (Petition, pp. 18a-37a) is reported at 318 F.Supp. 899. The opinion of the court of appeals (Petition, pp. 1a-12a) has not yet been reported.

Jurisdiction

The order of the court of appeals was entered on June 30, 1971. The petition for a writ of certiorari was filed on August 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Was the grand jury that indicted the petitioner unconstitutionally impaneled?

2. Was the petitioner's conviction totally unsupported by evidence, thereby depriving him of due process?

3. Since this Court, in dismissing petitioner's appeal in 1968 on the same record as here, has already either upheld the New York anarchy statutes or determined that their validity should not be reviewed because of the concurrent sentence doctrine, should it now pass upon them in the absence of new facts or law?

4. Are New York's criminal anarchy statutes violative of freedom of speech or unduly vague?

5. Are New York's statutes prohibiting conspiracy to commit the crime of riot constitutionally inapplicable to

speech, in circumstances of clear and present danger of violence?

6. Was the petitioner unconstitutionally prejudiced by the trial court's amendment of the count charging conspiracy to riot?

Statutes Involved

Former N. Y. Penal Law, §160.

Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Former N. Y. Penal Law, §161.

Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form,

containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or any state or of any civilized nation having an organized government because of his official character or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Former N. Y. Penal Law, §580.

Definition of conspiracy as a misdemeanor.

If two or more persons conspire:

1. To commit a crime * * *

Each of them is guilty of a disdemeanor.

Former N. Y. Penal Law, §2090.

Riot defined.

Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot.

Statement

This is the fifth opportunity that this Court has had to review the judgment in this case. The petitioner's first petition for certiorari was denied, his appeal was dismissed, rehearing was denied and his motion to file a petition for rehearing out of time was denied. The facts supporting his conviction, by now familiar to this Court, are as follows:

On Saturday night, July 18, 1964, the anger of thousands of residents of Harlem in New York City, intensified beyond the breaking point by recent news of the shooting of a youth by a police officer, broke out in riot. For months previously, the petitioner, a leader of a "clandestine" group advocating and preparing for violence against existing government authority, had sought ways to arm and organize the people of Harlem. The issue he had settled on to inflame the people was "police brutality," his proclaimed enemy being the "cops."

When riot erupted, while responsible community leaders ardently strove to restore people to calm and reason, Epton deliberately sought to organize and continue the riots. Busily working with other members of the group, delivering belligerent public speeches and issuing a stream of inflammatory leaflets directed primarily against the police, he openly urged that the police be fought and killed, and suggested methods for doing so. Meanwhile, conniving with others, he planned to distribute Molotov cocktails, to spread the riots, and to keep the rioters inflamed. The rioting ended in mid-week. But the following weekend, petitioner sought to lead a demonstration through the streets of Harlem, with the avowed intent of provoking further violence and renewing the outbreaks, and he was arrested.

The petitioner was indicted for conspiracy to commit riot, riot, conspiracy to commit criminal anarchy and criminal anarchy. The count charging the substantive crime of riot was dismissed by the trial court at the close of the People's case, and the defendant was found guilty on all other charges.

THE EVIDENCE AT EPTON'S TRIAL

The People's Case

Petitioner Epton's activities prior to July, 1964

Detective **Adolph W. Hart**, a member of the Police Department's Bureau of Special Services, testified that he was assigned to join the Harlem branch of the Progressive Labor Movement [P.L.M.] in November, 1963 (328-9, 612-21).* At the P. L. M. offices, 336 Lenox Avenue, he met

* References, unless otherwise indicated, are to the typewritten pages of the trial minutes, the state appeal having been heard on the original typewritten record.

William Epton, president of the Harlem branch of P. L. M., and told him that he wished to join a militant organization (329-30, 621-5). The petitioner told the witness he had "come to the right place, that his organization was militant, unlike CORE or the N. A. A. C. P.; he stated that they will fight and that they carry arms * * *." The P. L. M., the petitioner told Hart, believes in the "Chinese version" of Communism—that social revolution could be accomplished not by a peaceful transformation of government, but only through violence (331-9, 810-23).

In ensuing months, Epton had several conversations with Hart, telling him that "the organization was more or less clandestine and * * * party business could not be discussed with anyone outside the party," and that "they carried firearms * * * [H]e had weapons and * * * would supply the ammunition" (339-40, 642-3, 808-12, 823). Methods of defeating the police during demonstrations were also discussed, as was a proposal to train a cadre of leaders "in military and intellectual ways and means" (337-43, 638-42, 666-8, 736).

At a meeting of New York City members in March 1964, petitioner was elected a vice-chairman of the national P. L. M. (343-7, 633-6). A national program and party constitution was distributed that day; this document noted that "the over-riding historical task for us during the immediate period ahead is to build a Marxist-Leninist Party in this country * * * [i]n its policies dedicated clearly to isolating the ruling class and to expose and undermine the role of the state in our country and the world" (347-8, 352, 355-71, 625-33; Exh. 13). In discussing tactics to be employed in large cities, the documents stated that "neighbor-

hood defense organizations" should be established "to protect the people in the neighborhood from the cops * * * This movement must be aimed at the control of the streets by the people" (368; Exh. 13). Quoting Lenin in a "final note on why we must have a clear program of strategy and tactics," the document stated:

> "Never play with insurrection, but when beginning it firmly realize that you must go to the end. You must concentrate a great superiority of forces at the decisive movement, otherwise the enemy, who has the advantage of better preparation and organization will destroy the insurgents. Once the insurrection has begun, you must act with the greatest determination and by all means without fail, take the offensive * * * and at all costs retain 'moral ascendency' " (371; Exh. 13).

Aside from Hart, the Harlem branch of the Progressive Labor Movement had five members, including Epton and his wife (373, 848-52). In April one of these members, David Douglas [named as a co-conspirator], petitioner's "second-in-command" (373-4), told Hart that Epton had decided to try to organize the Harlem area block by block, starting especially with the teen-agers, with whom he would build up "terrorist bands" eventually powerful enough to "confront the police" (374-5, 379-80, 643-4). A month later, in May, petitioner told Hart that "police brutality would be the hot issue during the coming summer," and in June, Hart discussed the formation of a "Harlem Defense Council" with petitioner, Douglas, and five other persons, petitioner proclaiming that he wished to "mobilize the Harlem area, block by block, with a captain or lieutenant in charge of each block * * * [H]e would begin with simple picket lines procedure to arouse interest in the organization and

gradually work the people up into more militant actions * * * [E]ventually it was his wish to work the people up into a state that they would arm themselves, armed self-defense * * * [against] * * * the police" (382-3, 387-8, 644-9, 654-5, 661-3, 823-4).

Thursday, July 16, 1964—the death of James Powell

It was **stipulated** "that on July 16, 1964, in the daytime, in the East 70's, in the Borough of Manhattan, one James Powell, a fifteen-year-old Negro boy was shot and killed by Thomas Gilligan, a New York City Lieutenant of Police, who was then off duty and in civilian clothes * * * [T]here were several versions of this incident * * * in violent disagreement with each other, which were disseminated shortly after the time of the incident in newspapers and by means of radio and television in New York City, inclusive of the Harlem area of New York City" (883).

On that day, Detective **Hart** testified, letters were sent to prospective members of the Harlem Defense Council asking them to attend a street rally on Saturday afternoon, July 18, and a meeting at the Harlem P. L. M. headquarters on the evening of July 22nd (388-91; Exh. 14). Among "recent events" noted in the letters was one in which:

> "A young (15 year old) Negro youth was shot to death by an off-duty cop this afternoon on East 76th Street. The cop shot the kid once. He fell to the ground. The cop then stood over him and fired two more shots into him and then he kicked the kid after he was dead" (390-1; Exh. 14).

On the next day, at Epton's direction, a leaflet advertising the street meeting was distributed; its headline—"Stop the cops"—was suggested by Hart. The leaflet began:

"Once again the cops have murdered one of our children. They have been killing about one black person a day in New York City" (391-5, 650-4; Exh. 15).

Saturday, July 18—the eve of the riot

Detectives **John Rivera** and **Francis Koopman** testified that using a hidden transmitter and receiver they recorded a public speech made by the petitioner at the corner of 115th Street and Lenox Avenue, beginning at about 5 p.m. on the afternoon of July 18, 1964 (Rivera: 207-31; Koopman: 231-72, 277-316; Exh. 6). They identified in court typewritten transcripts of the recording (Exhs. 2, 3).

Addressing an audience numbering about fifty listeners, Epton spoke of the need for violent action:

"[W]e'll begin a campaign to organize a mass demonstration against the cops somewhere in this city. As it stands now, many organizations are talking and planning of where this demonstration is going to take place and we're not saying it's going to be a peaceful demonstration * * * They [the cops] declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now * * * because we had better stop talking about violence as a dirty word * * *.

"* * * If we're going to be free, and we will not be fully free until we smash this state completely and totally. Destroy and set up a new state of our own choosing and of our own liking. And in that process of making this state, we're going to have to kill a lot of these cops, a lot of these judges, and we'll have to go up against their army. We'll organize our own militia and our own army * * *. Think about it because no people in this world have ever achieved in-

> dependence and freedom through the ballot or having it legislated to them. All people in this world who are free got their freedom through struggle and through revolution. That's the way to gain freedom" (Exhs. 2, 6).

After introducing another speaker, petitioner spoke again, telling his listeners:

> "* * * We will take our freedom. We will take it by any means necessary and any means necessary as we know the beast that we are dealing with is that we have to create a revolution in this country and we will create a new government that is run by the people * * *. Those who are ready to come with us and stand with us and join the Harlem Defense Council * * * will go back into their blocks and organize their blocks into defense committees so when the deal goes through they will be able to be in the street tens of thousands strong ready to face that man. And we know how to use weapons just like they know how to use weapons. And when the deal goes down we have to be ready to confront them and beat them * * *" (Exhs. 3, 6).

Before the rally, Epton had informed Detective **Hart** that if between two hundred and three hundred people attended, he would organize a march to the 32nd Police Precinct on Lenox Avenue to demonstrate against police brutality (395-6). As it turned out, however, no more than a hundred or a hundred and fifty persons gathered at that rally at any one time, and the meeting dispersed without any demonstration or disturbance (Rivera: 225, 227-8; Koopman: 296; Hart: 396-9, 824-7, 852-4). But afterwards petitioner promised future "non-non-violent demonstrations and actions by him in that area" (Hart: 397-9, 852-3, 869-73).

The riot

That evening, July 18, rioting broke out in Harlem; Detective **Hart** saw thousands of persons "milling around" in the area from 110th Street to 135th Street between Lenox and Eighth Avenues (399-403, 827-9). Rocks were thrown at the police, stores were looted, Molotov cocktails hurled from roofs, while the police, trying to disperse the crowds, would charge in, sometimes hurting nonrioters (399-403).

Marc Crawford reported the Harlem riots for *Life* magazine (578-81). He came to Harlem on Sunday, July 19, the day after the rioting began, accompanied by a photographer, and observed events during the following week (581-5, 588-90). On Sunday, this witness saw a meeting in a church, addressed by civil rights leaders, break up "when a bunch of young people ran out of the church * * * heading toward the funeral home where the Powell boy's body was" (585). Thereafter followed "a complete breakdown of law and order" (585). "[A]s the night wore on and the darkness came, people began to jeer, * * * the whole traffic was disrupted" (586). There was shooting; a group of officers would fire in unison over building tops; "[o]ftentimes a bottle would fly from some place and the police would enter a building and clean the building out" (587). The reporter saw men beaten; one man he saw had been shot (587-8). One night during the height of the riots, the photographer accompanying the witness took a picture (Exh. 28) showing a group of youths holding posters exhorting "Wanted for murder—Gilligan the Cop," issued by the Harlem Defense Council (578-80, 1656-7).

Sunday, July 19

On that Sunday, the Harlem headquarters of P. L. M. was busy—Detective **Hart** saw "leaflets of all kinds * * * being run off the mimeograph machine. There were dozens of people in the office in and out, and everyone had suggestions as to how to combat the police in the Harlem area" (403-4). One of the leaflets, produced while the petitioner was present, and headlined "Stop the cops," began "Last night police from all over the city declared war on Harlem"; it invited the public to a meeting at the Harlem P. L. M. Club that night, ending "Those of you who protest the war of genocide being waged on black people should attend this meeting" (404-6; Exh. 16). About two thousand of these leaflets were distributed that day (421-2). Petitioner was at the P. L. M. office, but then left, and when he returned he said "he had been downtown to discuss the strategy that the Harlem Club would utilize during the present crisis" (408). After working in a back room, petitioner joined a group—consisting of William McAdoo, Harold Young [named as co-conspirators], Pernella Wattley and the witness Hart—and the discussion turned to whether a leaflet on Molotov cocktails should be prepared (408, 413-17, 449-53, 674-6, 682-7, 1659-61, 1663-6). Epton said it was "a good idea" but that "whoever printed the leaflet couldn't put their name on it" (408, 413-17). He added, "We couldn't print it here because the bond of paper could easily be traced and our mimeograph machine could also be traced back" (408, 413). That night Hart also walked in on a conversation in the back room between Epton and a person known as "Brother Lewis."

> "Brother Lewis stated that he had twenty to forty Molotov cocktails in the area of 128th Street and

> Lenox Avenue, but that he was having difficulty in moving them around in the area. At this time, William Epton stated that 'We have to get them out of the area'; that it was his wish to start something on the Lower East Side or some other area * * * in Harlem, to spread the police forces out, because they were too well concentrated in Harlem" (417-18).

Then, Hart in the room, Epton and Brother Lewis stopped talking about the Molotov cocktails (418).

Rioting broke out again that evening while the petitioner was holding his public meeting of the Harlem Defense Council at P. L. M. headquarters (407). The rioting outside could be heard and seen while the meeting was conducted (407-8, 422-3). Hart was "in and out" of the meeting room and did not hear the whole speech, but did hear petitioner, while he was addressing about thirty-five or forty people:

> "[He] stated that the people in the area would definitely have to organize to combat the police * * * He stated that there were various means of defeating the police, and one of them was suckering a cop off the main avenue away from the rest of the police, getting him in a side street, killing him and then going home for the night" (406-7, 663-5, 855-6, 873-81).

Patrolman **Frank Johnson** went to the offices of the Progressive Labor Movement at about 9 p.m. on the night of July 19, 1964, while rioting was taking place (884-5). Outside the premises, three or four people were handing out leaflets to passers-by, inviting them to a meeting being held on the second floor (885). The officer, wearing plain clothes, went upstairs, where he saw Epton speaking to a

group of about twenty or twenty-five people (884-5). Epton said:

> "I want to organize the people of Harlem, but not like CORE is organized. I want to organize them in a military manner, each block would have a captain, a block captain, and he would appoint lieutenants, house lieutenants, and so forth * * *
>
> "We already have the block captains * * *. Now, these block captains are being charged with the defense of the block and the instruction of the people" (886).

Asked by one woman in the audience, "How can we fight the cops? We don't have any weapons," petitioner answered:

> "Your block captain can instruct you how to make things, how to make the weapons out of the things on the street * * * You people have been throwing bottles, but once they strike the ground they are useless, but if those bottles are filled with a certain substance they become very effective" (868-7).

Asked to identify the "substance," petitioner said, "You know, if you don't know * * * your block captain can tell you and show you" (887, 889). He refused to go into further detail, saying "You can't tell who is here" (887). Speaking of a rally he scheduled for the following Saturday, Epton said that they would march to the "32nd Precinct, because that precinct has killed more of our brothers than any other."

> "As we march up Lenox Avenue, if the cops try and stop us, we won't fight on the avenues, because they will kill us on the avenues; we will fight in the side streets, the blocks * * *. We will create a disturbance in the side streets and draw the cops off the

> avenues, and then cut them off and then take care of them * * *. We want the State Militia called up" (887-8).

Thereafter, "a large group of people came into the room," and the officer left the meeting (888).

When Epton and Detective **Hart** left the office together that night, Hart "asked [Epton] again about the Molotov cocktails leaflet and he stated that it was one good way of keeping things going until Saturday" (420-1, 688-92).

Monday, July 20

On Monday, Detective **Hart** testified, the P. L. M. office was again "filled with people" asking for various leaflets that were being printed (423). A leaflet entitled "Organize Your Blocks" was prepared, in the petitioner's presence, and this leaflet called for a "mass demonstration" on Saturday, July 25th, with the 32nd Police Precinct to be the objective of the march (423-8, 678-9; Exh. 18). Distributed that day were about 20,000 copies of a poster which Epton had ordered, headlined "Wanted for Murder," picturing and naming the officer whose shooting of a youth had precipitated the riots (439-42; Exh. 19). In a discussion with Hart, Epton stated that "it was his wish to start something over in Brooklyn in an attempt to spread the police forces" (442-4).

Tuesday, July 21

When Detective **Hart** appeared at P. L. M. headquarters on Tuesday, he was wearing a "minifon," a hidden recording device (445-8, 453-5, 521-70, 669-70, 679-81, 747-65). He was, in part, seeking information about Molotov

cocktails leaflets (1661-2). A typewritten transcript of the conversation was identified by the detective at the trial (521-53; Exh. 25). In the recorded conversation, Epton said that the riot "is the greatest thing that's happened in years." Referring to Officer Gilligan, who had shot the youth, Epton noted "They may have to throw him to the wolves. Gilligan was a good man, but—"; with respect to his planned demonstration, he said:

> "Well we've had a lot of opposition from some of the so-called respectable groups. Oh, it's going to lead to nothing but a slaughter, a massacre * * * a massacre. And I called the cops today. I called the Sixth Division that's in charge of it and the Precinct cops and told them that we're having a peaceful demonstration that day" (Exhs. 25, 27, 27A).

Talking again of the scheduled Saturday rally, petitioner said, "Everybody knows what to do in the event the police show up." When someone asked "What about the guns?" petitioner replied "What guns? * * * Oh, I don't know anything about any guns * * * I told you before this is a public office" (Exhs. 25, 27, 27A).

The remainder of the week

Preparations for the Saturday rally intensified. A leaflet was issued depicting a policeman firing a pistol at a boy lying on the ground with his schoolbooks, near a sign reading "School Zone. Quiet." The leaflet was inscribed "Stop the killer cops now" and urged the reader to "join the mass demonstration, Saturday, July 25th, starting at 4 p.m., at 116th Street and Lenox Avenue" (455-7; Exh. 20). On Thursday, July 23rd, petitioner told Detective Hart that at a meeting the previous day he had picked be-

tween thirty and forty "block captains and lieutenants"; the people would join the march and the march would "build up momentum" as it moved up Lenox Avenue toward the 32nd Police Precinct. Epton expected to be arrested, and he hoped the crowd would react violently to his arrest (458-62). "[W]hen they confronted the police they would melt the people into the blocks and get them off the main avenues so that they could do whatever they were going to do within their own blocks" (460-1). When Hart observed that the situation had, by Thursday, "quieted down," Epton "stated that it was all right, just as long as they were preparing for Saturday" (461). On Friday, preparation of signs and leaflets continued (423). After a police officer came to the office to inform petitioner that a permit for the street rally had been denied, petitioner told Hart that "the demonstration would go on regardless" (463-8, 868-9, 875-6).

Saturday, July 25—the petitioner's arrest

Deputy Inspector **Eldridge Waith** held the rank of Captain in July 1964, and during the riots was assigned to supervise detectives and patrolmen in Harlem (835-6). On July 25th, at about 4 p.m., Captain Waith, acting on information received from his superiors and aware of the tension in the community, waited for the petitioner to appear on the corner of Lenox Avenue and 116th Street (836-7, 843-6). There was, at that time, no rioting (842-3). As Epton arrived, accompanied by four or five other men, the Captain approached him, identified himself, and "told him that he wasn't allowed to march; if he persisted in marching, I would have to arrest him" (837). The police officer informed Epton that "his actions had caused a crowd to

collect, would block the walk, and disturb the peace." A large crowd was collecting. There were about twenty policemen in the area (841). But Epton continued on, forming a line of persons six or seven abreast, "and behind them were another file of persons, at least one more file * * * marching, arms locked together" (837-40, 842, 845; Exhs. 39-39C). Warned twice more not to march, petitioner continued leading the crowd, and was arrested for disorderly conduct (837, 846).

The Defense

William Epton, vice president of the Progressive Labor Party—a "Marxist-Leninist organization"—testified that he was born and raised in Harlem (1069-70). The petitioner joined the Communist Party in 1958, as a result of the poor living conditions he had seen in Harlem, but he left the organization in 1962, because "it no longer had a program to resolve those problems" (1075-6, 1186-9, 1201-4). Then he became active in the P.L.M., which "had a program that revolved around the basic issues confronting the American people, as we saw them"—housing, schools, voting, jobs, and police brutality (1070, 1076-7, 1204-6). A local office of P.L.M. was opened at 336 Lenox Avenue, in Harlem (1212-17). Petitioner generally agreed with the theoretical doctrines and philosophy expressed in a prospective draft of the movement's program (Exh. 13) [see pp. 6-9, *supra*], but he did not think that P.L.M. was a revolutionary organization (1182, 1207-12, 1410-24, 1461-8, 1473-4).

The Progressive Labor Movement, petitioner testified, was an open organization, not a clandestine one (1113A). Petitioner first met Adolph Hart in November, 1963, when

Hart walked into the offices of P.L.M. and asked to join the organization (1112). Epton did not recall whether he spoke to Hart of "bloody revolution" in the United States. He did not, however, speak to Hart of tactics to defeat the police, or of supplying and carrying firearms (1113-18). He spoke to Hart about forming a "cadre school" for future P.L.M. leaders, and also about organizing the Harlem Defense Council, a "block by block" organization, but mentioned no plans to organize it along military lines or use teen-agers as terrorists (1134-6, 1254-8).

In about May, 1964, because of police brutality, Epton wished to "organize the people of our community * * *, organize our protests and take [them] to the proper authorities * * *" (1085-93, 1288-9, 1354-5, 1477-8). The main purpose of the street meeting of July 18, 1964, first planned a week previously, was "to organize the people around the issue of police brutality" (1098-1100, 1268-73). However, in applying for a permit to use sound devices at the street meeting, the group stated that the purpose of the meeting was "to discuss the civil rights bill" (1459-61, 1476-7; Exh. 51). Then, two days prior to the already scheduled meeting, the shooting of James Powell occurred (1100, 1136-7).

Petitioner's angry feelings, he testified, were reflected in the remarks he made at his July 18th meeting; he attempted, in the six times he spoke that day, to "put into historical perspective what was happening to the black people [and the white workers] in this country today." He said not only the remarks recorded by the police (Exhs. 2, 3), but also that "in history when people attempted to better their conditions, to better that government that they

felt was oppressive, that in the course of changing that government violence occurred and in the course of that violence people were hurt and injured" (1101-2).

He then told his audience that his proposed demonstration—a march to the 32nd Police Precinct—would not be peaceful, because the police would commit violence against them (1102-3, 1445-52). When he said "every time they kill one of us, damn it, we'll kill one of them," "* * * it wasn't the idea that I was telling the people to go out and kill a cop or to kill anyone. * * * I was saying that we have reached a point where we have to begin * * * rethinking our whole existence in this society and that is why I raised the question that people must begin to think about these things in the future" (1103-4). He did not use the word "kill" to signify the taking of a life (1452-8). When he talked that day of "smashing the state" and killing "a lot of these cops, a lot of these judges," he did not mean to refer to New York State, but to the entire "capitalistic system." But he was not then advocating that anyone "smash" anything—"[W]e have never at any time told people to go out and hurt anyone" (1105-8). Indeed, he claimed, he changed his mind about leading a march to the 32nd Police Precinct on that day because he recognized that

> "Harlem was seething * * * it was a hot Saturday * * * People were indignant, they were mad * * * [W]e would have been creating a dis-service to our community by having that demonstration * * *—the mood of the community was such that it was like a tinderbox ready to explode because of the killing of Powell by Gilligan; so as a result of that we decided not to have that demonstration on the 18th" (1108-10, 1398-9).

The next day, Sunday, July 19, the meeting at P.L.M. headquarters was starting when petitioner arrived, at about 8:45 p.m. (1143-4, 1370-6; Exh. 16).

> "* * * The meeting was an open public meeting; * * * there were some police officers that we knew, that we had seen around the community in civilian clothes, and there were of course those what we didn't know. We had constantly admonished the people that they should be very careful as to what they were saying because this was a public meeting; not only that, because they themselves could easily get into a lot of trouble because they were very warm, they were very mad, incensed, and they would jump up—and many people did during the course of the meeting—made many wild statements about how to kill cops, about how to get Molotov cocktails, how to go get guns * * * All of these suggestions during the course of the meeting that I was chairman, I had pooh-poohed. I told them no, that this was not our program—what we were trying to organize was a peaceful demonstration" (1144-5).

Petitioner testified that someone that night suggested that the police be "ruckered" off the avenue and killed, but he neither said it himself nor agreed with it; there were some "drunks" at the meeting who were making these points (1144-5, 1148). He did not recall whether he said, that night, that "block captains" could instruct the people on how to make weapons, or that bottles "filled with a certain substance" are very effective, or that the police should be drawn into side streets (1468-70). He recalled no conversation with "Brother Lewis" concerning Molotov cocktails (1148).

Most of the petitioner's time from Monday, July 20th, was spent "organizing for the demonstration, for the march of July 25" (1148-9). Informed of the police "ban" of his demonstration, he decided to continue preparations anyway; "we were going to have a peaceful demonstration, we would control the demonstrators, and there would be no trouble at all" (1151-2).

At noon on July 25th, a committee representing seventy-six Harlem organizations asked petitioner to call off the rally, but after petitioner's proposals for a joint rally with these other organizations were rejected, he decided to go on with the demonstration (1156-9). About twenty-five people attempted to march that afternoon (1160-1, 1396-8). As they tried to cross Lenox Avenue at 116th Street, he was arrested (1161-2).

Summing up his alleged attitude towards the riots, petitioner testified that, as a Marxist, when he spoke of "revolutionary change," he understood a change of governmental system which would be successful only if the majority of people in a country decided that they cannot live under the present system (1182-3). Such revolution, he believed, is not imminent in this country "by a long shot" (1183). He had no intention of turning the "senseless destruction" of the Harlem riots of July, 1964 into a revolution, and wanted but to organize the Harlem community so that the people "could best present their grievances to the power structure" (1183-4). Petitioner did not believe or advocate that the State of New York should be brought down by the assassination of public officials (1184-5).

Vivian Anderson, convicted of contempt in a grand jury proceeding concerning this case, was a member of the Progressive Labor Movement, which she joined in September, 1963 (1594-5, 1635-7). She testified that she had never discussed the use of violence, terrorist gangs, or guns with petitioner (1596), had never heard him advocate the assassination of New York State officials or overthrow of the state government, and had never heard him discuss Molotov cocktails (1598-9, 1643-4). This witness was present at the street meeting on the afternoon of July 18th, when Epton spoke, but was "busy" and did not recall much of what he said (1602-3, 1608-22). She was "around the area of the Progressive Labor office" on Sunday evening, July 19th, when Epton held a meeting in the office, but did not go into the meeting to hear him speak (1597-8).

When appearing before the grand jury, she told the truth, but refused to answer questions (1635-7), although petitioner had told her to tell the truth before the grand jury (1635-6).

Pernella Wattley had known William Epton since the spring of 1961, and had occasionally been in the office of the Progressive Labor movement, but was not a member of the organization (1534-5). She contradicted Detective Hart's testimony that she was present at P.L.M. headquarters on July 18 and 19 (1535-7, 1544-5).

Walter Flesh, Bennie Brazier and Mrs. **Phenicia Craig** described instances of police brutality and their discussions of police brutality with petitioner (1479-1507, 1547-72, 1508-12).

Alexander J. Allen, executive director of the New York Urban League, was a member of the committee which urged petitioner to call off the march planned for July 25th (1578-9, 1582). "We were fearful that this might be the kind of spark which would set off additional violence, not that we thought that the march itself was designed for that purpose, but we knew the temper of the community and the temper of the police and we knew that there were a number of signs which indicated that there could be additional conflict" (1582). But Epton told Allen that the march would be peaceful (1586).

Petitioner also produced several character witnesses (1586-93, 1657-8).

Subsequent Proceedings

The jury convicted the petitioner of conspiracy to commit the crime of riot [former New York Penal Law §§580, 2090], conspiracy to commit the crime of advocacy of criminal anarchy [former New York Penal Law §§160, 161, 580] and advocacy of criminal anarchy [former New York Penal Law §§160, 161]. The trial court sentenced him on each count to serve a term of one year in the penitentiary of the City of New York, the sentences to be served concurrently. The judgment was affirmed by the Supreme Court of the State of New York, Appellate Division, First Department, on December 8, 1966 (27 A D 2d 645) and by the Court of Appeals of the State of New York on May 16, 1967. 19 N Y 2d 496. This Court denied certiorari and dismissed the appeal. 390 U.S. 29 (Douglas, J., dissenting), *rehearing denied,* 390 U.S. 976 (1968), *motion for leave to file a petition for rehearing out of time denied,* 398 U.S. 944 (1970).

The petitioner was subsequently released on bail by Judge MARVIN E. FRANKEL of the district court. 281 F. Supp. 388 (S.D.N.Y. 1968). Counsel for both respondent and petitioner agreed that the merits of one of petitioner's claims, that the grand jury which indicted him was unconstitutionally impanelled, would be determined substantially upon the hearing on a similar issue accorded the defendants in the case of *People* v. *Chestnut, et al.* After the decision by the New York Court of Appeals in that case, petitioner's coram nobis claim before the Supreme Court of New York County attacking the composition of the grand jury was denied [CULKIN, J. (June 18, 1970)]. On October 5, 1970, Judge FRANKEL denied the petitioner's petition for a writ of habeas corpus, issued a certificate of probable cause and continued him on bail pending appeal. The court of appeals unanimously affirmed the district court's order on June 30, 1971. By an order entered July 19, 1971, it continued the petitioner on bail pending the determination of his petition to this Court for a writ of certiorari.

Summary of Argument

In a week when violence exploded on the streets of Harlem, petitioner William Epton, culminating months of effort to provoke the people of his community to violent action, sought to spur the rioters to continued fighting and destruction, hoping thereby to render powerless existing authority and to gain leadership in the community for himself and his revolutionary organization, the Progressive Labor Movement. For this inflammatory conduct, he was convicted of conspiracy to commit the crime of riot, conspiracy to commit criminal anarchy, and criminal anarchy.

Petitioner argues that the panel of the New York County Grand Jury which indicted him was impaneled by systematic exclusion of members of the community who were entitled to representation. In so urging, he repeats arguments which were recently rejected in another case by the New York Court of Appeals, after a complete evidentiary hearing in the trial court, in an attack brought by witnesses before the grand jury that was investigating the Harlem riots, petitioner Epton having agreed to rely upon the record of that hearing. *People* v. *Chestnut,* 26 N Y 2d 481 (1970).

The respondent has filed a brief in this Court in opposition to a petition for a writ of certiorari in *United States ex rel. Chestnut et al.* v. *Criminal Court et al.,* No. 71-156, October Term, 1971, discussing identical contentions. We respectfully refer the Court to that brief, three copies of which have been served on petitioner Epton.

Petitioner asserts that there was no evidence whatever of a clear and present danger that his conduct would cause violence or intensify existing violence. Since substantial evidence of petitioner's guilt on all counts consisted of proof of petitioner's conduct classified as "speech," the People were required to prove a clear and present danger that petitioner's conduct would lead to violence or intensify the riots. *Dennis* v. *United States,* 341 U.S. 494 (1951); *Yates* v. *United States,* 354 U.S. 298 (1957). Such evidence was abundant, however.

At a time when tempers in the Harlem community were inflamed by the killing of a Negro youth by a policeman,

Epton urged a street-corner crowd to "stop talking about violence as a dirty word * * *." In "smashing this state," he urged, "we're going to have to kill a lot of cops, a lot of the judges, and we'll have to go up against their army * * *." In his own testimony at trial, he admitted that at this time "Harlem was seething," "a tinderbox ready to explode." After rioting indeed broke out that night, petitioner deliberately sought to increase the violence, planning for distribution of Molotov cocktails, instructions to other in their manufacture and use, and rioting in other parts of the city. In a nocturnal speech at his headquarters, while the sounds of rioting were audible in the background, he called to the angry audience to organize "in a military manner * * *. We already have the block captains," who could "instruct" the citizens "how to make weapons out of the things on the street * * *. You people have been throwing bottles, but once they strike the ground they are useless, but if those bottles are filled with a certain substance they become very effective * * *." While the police were engaged in trying to control rampaging mobs, he counseled "suckering a cop off the main avenue away from the rest of the police, getting him in a side street, killing him and then going home for the night." In the ensuing days of tension, he prepared for a "mass demonstration," ignoring warnings of possible outbreaks, with the purpose of provoking further violence by his own arrest. In sum, this was a classic case of clear and present danger; petitioner shouted for more fire in a "tinderbox" that had already burst into flames.

Petitioner also claims that the New York criminal anarchy statutes violate the First Amendment protection of freedom of speech. This Court, in dismissing the peti-

tioner's appeal in 1968, on the same record as here, decided either that the statutes were valid or else that their validity should not be reviewed under the concurrent sentence doctrine, the petitioner having been convicted of conspiracy to riot in addition to the anarchy convictions and received concurrent sentences on all three convictions. There are no new facts or new law that should move this Court to change its 1968 ruling. Moreover, the concurrent sentence doctrine has recently been followed by this Court. *Burton* v. *New York*, 402 U.S. 991 (1971).

In any event, the anarchy statutes are valid. They have long been construed to cover only intentional, not abstract advocacy. *People* v. *Gitlow*, 234 N.Y. 132 (1922), *affirmed*, 268 U.S. 652 (1925); see *Dennis* v. *United States*, *supra*; *Yates* v. *United States*, *supra*. The trial court charged the jury accordingly. Further, the case was submitted to the jury under the clear-and-present-danger test, the Court of Appeals likewise applied that test, and the proof in fulfillment of that standard was clear. *Bryson* v. *United States*, 396 U.S. 64, 69 (1969).

Although, as the dissenting Judge in the New York Court of Appeals pointed out, the New York Court of Appeals formerly had rejected the clear and present danger test [*People* v. *Gitlow*, *supra*], and then adopted it here, petitioner received adequate notice that his conduct was covered by the anarchy law. The clear and present danger standard had been announced by the United States Supreme Court in the *Dennis* case, which involved a statute patterned after the New York law, and thereafter the New York anarchy statute remained on the books unaltered.

The elements of the crime remained the same, the only change being the new limitation on the conditions under which the statute could constitutionally be applied. Petitioner was surely on notice that the *Dennis* test, applied to a statute indistinguishable from New York's, would have to be adopted by the New York courts. Moreover, petitioner's conduct was of the "hard core" type to which any reasonable construction of the statute would apply. *Williams* v. *United States*, 341 U.S. 97, 104 (1951).

Petitioner, turning to his conviction for conspiracy to commit riot, claims that this conviction was based entirely on evidence of speech, and therefore deprived him of freedom of speech. As pointed out by the district court, however, this was a misstatement of the facts because the petitioner also engaged in "unprotected acts," acts upon which the prosecution's case heavily relied. Moreover, the trial jury and the New York Court of Appeals found the evidence, including words, to establish a "clear and present danger" of riot.

Finally, the petitioner discerns a denial of due process in the court's amendment of the count charging conspiracy to riot. The change, after all the evidence had been presented, from "which disturbed" to "which would disturb" the public peace was a mere semantic one to clarify the charge for the jury, and in no way affected the proof of the crime or prejudiced the defense.

ARGUMENT

POINT I

The grand jury that indicted the petitioner was lawfully impaneled without purposeful or intentional exclusion of any element of the community entitled to representation.

Petitioner attempted to challenge the grand jury statutes in his prior petition, although the validity of the statutes had not been raised in the New York Court of Appeals or passed on by that Court. For the reasons stated in respondent's brief filed in opposition to a petition for a writ of certiorari in *United States ex rel. Chestnut et al.* v. *Criminal Court et al.*, No. 71-156, October Term, 1971, it is clear that the grand jury that indicted the petitioner was not impaneled in violation of the Constitution. We respectfully refer the Court to that brief, and have served three copies of it upon petitioner.

POINT II

The verdict was fully supported by evidence, petitioner's guilt having been proved beyond a reasonable doubt.

The charges against petitioner were submitted to the jury on the theory that evidence of a clear and present danger of violence was required to support a verdict of guilty. Petitioner contends, as he did in his first petition for certiorari, that there was no evidence whatever of a clear and present danger of the overthrow or attempted overthrow of the government of the State of New York. Such evidence was abundant, however.

The evidence clearly established, first, petitioner's direction of a conspiracy to promote and continue the existing riots [former N.Y. Penal Law, §§580, 2090, 2091]—a conspiracy directed principally against the police—under circumstances of a clear and present danger that his utterances would contribute to and intensify existing violence. Before the riots broke out, Epton predicted that "police brutality would be the hot issue during the coming summer" (388). To exploit this controversy, he organized a group entitled the "Harlem Defense Council" which he hoped to "mobilize" against the police (374-88). So, when a youth, James Powell, was shot by police officer Gilligan on July 16, 1964 (883), Epton prepared for general violence. Addressing a crowd on a street corner two days later, knowing that tempers had been inflamed by the recent shooting, he urged his audience to "* * * stop talking about violence as a dirty word. * * * [I]n that process of smashing this state, we're going to have to kill a lot of these cops, and of these judges, and we'll have to go up against their army —We'll organize our own militia and our own army * * *" (388-99; Exhs. 2, 3, 6). Though the people he addressed that afternoon dispersed peacefully, petitioner's wish to see violence in the streets came true that night when full-scale rioting erupted over a large area of Harlem (225, 227-8, 296, 399-403, 578-88; Exh. 28). While looters smashed into stores, other rioters disrupted traffic, threw rocks at the police, and hurled "Molotov cocktails"—home-made incendiary bombs—from roofs (399-403, 585-7); there was "a complete breakdown of law and order" (585). At the height of the riots, posters proclaiming "Gilligan—wanted for murder," distributed by the petitioner's organization, were displayed as a symbol of defiance (578-80, 1145-7; Exh. 28).

From that time on, and for the rest of the week, petitioner worked hectically to fan the flames of disorder. Privately, with his followers, he made plans to spread out and weaken the police forces by provoking riots in other areas of the city and by distributing Molotov cocktails (417-18, 442-4). Publicly, he and his organization continuously issued and circulated leaflets inspiring hatred of the police, pointing to the police force as a military enemy to be fought violently and beaten (403-6, 413-17, 420-42, 455-7, 462-6, Exhs. 16, 18-22). In a speech at his headquarters, while the sounds of riot could be heard, petitioner told his heated audience he wanted "to organize the people of Harlem * * * in a military manner, each block would have a captain. * * * We already have the block captains. * * * Your block captain can instruct you * * * how to make weapons out of the things on the street. * * * You people have been throwing bottles, but once they strike the ground they are useless, but if those bottles are filled with a certain substance they become very effective. * * * [I]f you don't know [what to fill them with] * * * your block captain can tell you and show you" (886-7, 889). That night he also instructed his audience that "there were various means of defeating the police, and one of them was suckering a cop off the main avenue away from the rest of the police, getting him in a side street, killing him and then going home for the night" (406-8, 422-3, 663-5, 855-6, 873-8, 884-8). He wanted the fighting so intensified that the state milita would be called into action (887-8).

Later in the week, as the riots died down despite his efforts to "keep things going," Epton planned and publicized another street demonstration—a march to a Harlem

police station (420-1, 455-69). Cynically, he told those respected persons who asked him to call off the march that his demonstration would be a peaceful one, but privately he assured his followers that he sought and expected to cause the outbreak of more street violence (458-68; Exhs. 25, 27, 27A).

Testifying in his own defense, Epton conceded having engaged in most of the described activities during the week of riot—denying only that he made plans to arm the rioters, distribute Molotov cocktails, or publicize the way to make the bombs (1141-56, 1162-85). But he absurdly insisted that he did not always mean what he said. For instance, when he mentioned, in his talk, suggestions on the use of violence, he was just "fluffing them off"; when he used the word "kill," he did not mean to signify the taking of a life (1101-10, 1141-8, 1162-85, 1452-8, 14[illegible]-70).

The evil of petitioner's intent, and the error of his present claim of utter lack of evidence of clear and present danger, are further demonstrated by his admission on the stand that on July 18, the eve of the riots, he knew that "Harlem was seething," that it was "a tinderbox ready to explode," and that because of this any plan to lead a protest march to a police station would have been a "disservice to the community" (1108-10, 1398-9). Yet, after the riots erupted, Epton devoted his energies to leading another protest march, the next week, under even more provocative circumstances (1148-62). The widespread hysteria in the community, and the potential for more conflict were corroborated by another defense witness, Mr. Allen (1582-6). Having missed the first opportunity to take command of a riot, Epton wanted to try again. Fortunately, however,

calm had returned and Epton and his followers could stimulate no further disorder. If, as petitioner claims, there was no proof that his conduct caused violence, this should not be confused with the absence of a danger.

Thus, the proof of petitioner's leadership of a conspiracy to promote further rioting in an already violent situation was overwhelming. These same facts, coupled with the evidence that petitioner, long advocating the necessity of the overthrow of government by force (382-469), called for violence during these riots for the purpose of destroying the authority of the existing government in the locality, proved as well the crimes of criminal anarchy and conspiracy to commit criminal anarchy. Former N.Y. Penal Law §§160, 161, 580.

POINT III

The validity of the state anarchy statutes need not be reviewed; and in any event, these statutes are constitutional.

Appellant was convicted of conspiracy to commit the crime of riot [former N.Y. Penal Law §§580, 2090], conspiracy to commit the crime of advocacy of criminal anarchy [former N.Y. Penal Law §§160, 161, 580], and advocacy of criminal anarchy [former N.Y. Penal Law §§160, 161]. He was sentenced on each count to serve a term of one year in the penitentiary of the City of New York, the sentences to be served concurrently.

Although the New York Court of Appeals held the anarchy statutes constitutional (19 NY2d 496 (1967)), this

Court dismissed the appeal when petitioner previously attacked them before this Court and the lower federal courts therefore considered themselves foreclosed from reviewing them. As District Judge FRANKEL soundly reasoned, when this Court dismissed the appeal, it had either held the anarchy statutes to be constitutional or held that the issue should not be reached because the sentences for anarchy were concurrent with the sentence for violation of the riot statute, which was not challenged by petitioner (Petition, pp. 28a-32a). *See Samuels* v. *Mackell,* 288 F. Supp. 348, 354 n. 6 (S.D.N.Y. 1968) (FRIENDLY, J., for 3-judge court), *aff'd on other grounds,* 401 U.S. 66 (1971); *Epton* v. *New York,* 390 U.S. 29 (1968), concurring opinion, STEWART, J.; *Lanza* v. *New York,* 370 U.S. 139 (1962); *Hirabayashi* v. *United States,* 320 U.S. 81, 85 (1943).

Petitioner argues, however, that after the dismissal of his appeal, this Court later overruled the concurrent sentence doctrine in *Benton* v. *Maryland,* 395 U.S. 784 (1969). The district court correctly held that even assuming that to be the case, Epton could not retroactively benefit from it, citing *Gaines* v. *Rugg,* 148 U.S. 228, 244 (1893). The district court further stated that the doctrine had not been eliminated by this Court as a rule of convenience and that, indeed, the circuit court below and other circuit courts, have on a number of occasions subsequent to *Benton,* used the doctrine of concurrent sentences in deciding not to reach an issue. As the district court wisely concluded, "If it is discretionary whether the concurrent sentence doctrine will apply despite the disposition by the Supreme Court almost three years ago, the appeal must lie to the discretion of that Court, not this one" (Petition, p. 32a).

The court of appeals adopted the same position (Petition, p. 7a). A recent decision by this Court dismissing an appeal because concurrent sentences had been imposed vindicates the courts below and shows that the doctrine of concurrent sentences has continuing validity. *Burton* v. *New York,* 402 U.S. 991 (1971). Since petitioner has shown no ground for altering this Court's disposition of his case in 1968, certiorari should again be denied.

In any event, the anarchy statutes are constitutional. Section 160 of the former New York Penal Law defines "criminal anarchy" as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means." Section 161 of the former New York Penal Law proscribes the advocacy of criminal anarchy by speech or writing, or by organizing any group or assembly of persons formed to teach or advocate such doctrine. These statutes were upheld as constitutional in *Gitlow* v. *New York,* 268 U.S. 652 (1925), *affirming* 234 N.Y. 132 (1922). Petitioner contends that they are void for vagueness, and violate freedom of speech.

The reasonable construction of a statute so as to conform it to the Constitution and preserve its validity is a basic principle of statutory interpretation. Indeed, this Court has followed the principle in construing a federal enactment virtually identical to New York's criminal anarchy statute. *Dennis* v. *United States,* 341 U.S. 494 (1951); *Yates* v. *United States,* 354 U.S. 298 (1957). Thus, the trial court in the instant case properly instructed the jury that Sections 160 and 161 of the Penal Law outlaw

only an intentional call to action under circumstances of clear and present danger, excluding mere advocacy of doctrine from the scope of the statute (1915-18, 1921-7, 1959-72, 1982-90, 1998). The New York Court of Appeals reaffirmed this interpretation in its opinion. So defined, these statutes are unquestionably valid. See *Samuels* v. *Mackell, supra,* 288 F.Supp. at 352-3.

The distinction between advocacy of doctrine and intentional advocacy of action has been recognized as part of the New York statutes since the *Gitlow* case itself. In *Gitlow* v. *New York, supra,* this Court noted with approval that the trial court had charged the jury to "determine what was the intent, purpose and fair meaning" of the defendant's writing. 268 U.S. at 661. Construing the statute, the majority opinion stated:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. * * * It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose." *Id.* at 664-5.

Similarly, in *Yates* v. *United States, supra,* this Court construed the Smith Act—a federal enactment "nearly identical" to the New York criminal anarchy statutes—to contain implicitly the distinction between advocacy of doctrine and of action; the Court noted that "This distinction was heavily underscored in *Gitlow* v. *New York.* * * *" And this Court was able to read the distinction into the Smith Act, in good part, because New York's

criminal anarchy law was "the prototype" for the federal statute. *Yates* v. *United States, supra* at 318-320.

The majority in *Gitlow,* however, upheld the constitutionality of the New York statutes without limiting their applicability to instances of clear and present danger, thereby taking "a narrow view * * * of the First Amendment." *Yates* v. *United States, supra.* The views of Mr. Justice Holmes, dissenting in *Gitlow,* are now generally accepted. *Dennis* v. *United States,* 341 U.S. 494, 507 (1951). But by no means may this development of constitutional rights be taken to mean that the statutes upheld in *Gitlow* are now unconstitutional. Rather, Mr. Justice Holmes's dissent itself indicated that the statutes are constitutionally valid, if their applicability is limited to instances of "clear and present danger," as was done in this case:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent." *Gitlow* v. *New York, supra* at 672-673 (dissent).

Accordingly, a generation later, with reference to the Smith Act, which in its language makes no mention of "clear and present danger," this Court stated:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the

> right to prevent * * * We see no difference from the standpoint of vagueness, whether the standard of 'clear and present danger' is one contained in haec verba within the statute, or whether it is the judicial measure of constitutional applicability." *Dennis* v. *United States,* 341 U.S. 494, 514-515 (1951).

By "clear and present danger," this Court did not indicate that the government must actually face overthrow, but that the proscribed advocacy takes place under circumstances "such as reasonably to justify apprehension that action will occur." *Yates* v. *United States, supra* at 321; *Dennis* v. *United States, supra* at 509-511.

The petitioner, however, citing *Brandenberg* v. *Ohio,* 395 U.S. 444 (1969), complains that the trial court failed, in its charge to the jury on anarchy, to include "incitement to imminent lawless action" (*id.,* at 449). That the proscribed advocacy constitute a call to action is, of course, an element in the crime of criminal anarchy. The trial court here properly instructed the jury that Sections 160 and 161 of the Penal Law outlaw only an intentional call to action under circumstances of clear and present danger, excluding mere advocacy of doctrine from the scope of the statute (1915-18, 1921-7, 1959-72, 1982-90, 1998). The New York Court of Appeals reaffirmed this interpretation in its opinion. *Bryson* v. *United States,* 396 U.S. 64, 69 (1969).

Petitioner contends, however, that the trial court's charge to the jury on the question whether a clear and present danger of violence existed was inadequate. But petitioner took no exception to the charge on clear and present danger at any time before the jury reached its verdict (1972-3) [see N.Y. Code Crim. Proc. §420-a]; his objection to the charge was first heard a month later, at

the time of sentencing (2072-4). Rather, at the time the court charged the jury, petitioner requested that the jury be instructed to consider whether he had agreed with others that his advocacy of overthrow of government would take place "under circumstances such as to lead to a probability that it would inspire persons to take action toward the overthrow of the government of the State of New York by using force and violence * * *" (2017-18; see also 2028); the court so charged (1963-4).

The petitioner, then, may claim no privileged advocacy of political "ideas" that are, in fact, a call to violent action at a time and in a place where violence is already present. Worse than falsely shouting fire in a theatre [*cf. Schenk* v. *United States,* 249 U.S. 47 (1919)], petitioner called for more explosions from a "tinderbox" already aflame (1109). As Mr. Justice DOUGLAS stated in a hypothesis now tragically come true:

> "If this were a case where those who claimed protection under the First Amendment were teaching * * * the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality." *Dennis* v. *United States, supra* at 581 (dissent).

Petitioner further contends that the adoption of a "new" construction of the state anarchy statute by the New York Court of Appeals in this case deprived him of due process. In *People* v. *Gitlow, supra,* the state court had already construed the statute to apply only to deliberate, intentional advocacy, not to theoretical, abstract advocacy; the decision in the instant case added nothing new in this

respect. But the clear-and-present-danger test was rejected by the Court of Appeals and this Court in *Gitlow,* and was not expressly announced as applicable to the New York statute until the trial court's charge to the jury in the case at bar, which was reaffirmed in the appellate opinion. Petitioner urges, as did Judge Burke in dissent in the New York Court of Appeals, that he was not given adequate notice of the statute's meaning. That Court properly rejected this argument.

While it is true, as petitioner urges, that a penal statute must give adequate notice of the conduct proscribed—of the elements of the crime—the clear-and-present-danger test is not an element of the crime, but a "judicial measure of constitutional applicability," a standard as to when certain conduct set forth in a statute may constitutionally be punished. See *Dennis* v. *United States, supra,* 341 U.S. at 514-515. Indeed, at a jury trial for criminal anarchy the trial court alone may rule on the issue of clear and present danger. *Id.* at 513. Thus, the *Dennis* and *Yates* decisions, while limiting the circumstances under which advocacy of anarchy could be prohibited, did not re-define the conduct itself. Analogously, in *Ginzburg* v. *United States,* 383 U.S. 463 (1966), this Court applied to federal obscenity statutes a new test of evidence, looking to the circumstances under which publications were advertised and distributed, to determine whether they were obscene. While broadening previously announced rules as to the applicability of the obscenity test, the change did not, in the view of the majority of the Court, deprive the defendant of the adequate notice.

Moreover, as the Court of Appeals pointed out in this case, Sections 160 and 161 of the New York Penal Law

have remained on the books since the *Dennis* decision, and no change has occurred in the statute on its face.* The Court of Appeals has consistently applied the presumption that the legislature intends to enact statutes which are in harmony with the Constitution; therefore, petitioner was on notice of the clear obligation of New York courts to construe the anarchy statute in accordance with sound constitutional principles. See *Samuels* v. *Mackell, supra* at 354-5.** He had no right to rely on an assumption that the courts would hold the statutes unconstitutional. *Scales* v. *United States*, 367 U.S. 203, 224 (1961). In short, the conduct charged in the indictment was "within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution." See *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1964). Provided there is fair warning, "once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction." *Id.* at 491 n. 7. Moreover, petitioner's deliberate lighting of a spark in a "tinderbox ready to explode" (as he later described the neighborhood at trial) was "the sort of 'hard-

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* In 1965 the state legislature enacted a Revised Penal Law, effective September 1, 1967, which carried over the former anarchy statute as follows:

> "§240.15 Criminal anarchy
>
> "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow * * *."

** As Judge FRIENDLY there stated where the defendants challenged the validity of the anarchy statutes, "No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity * * * [There was no evidence that the defendants] entertained the beliefs their lawyers now ingeniously impute to them * * *."

core' conduct that would obviously be prohibited under any construction of the statute." *Id.* at 491-492; see *Samuels* v. *Mackell, supra* at 354. Hence, the claim of vagueness is without merit. *Williams* v. *United States,* 341 U.S. 97, 104 (1951); *Scales* v. *United States, supra* at 223.

Petitioner argues, however, that the criminal anarchy statutes have effectively been declared unconstitutional in the case of *Keyishian* v. *Board of Regents of the State of New York,* 385 U.S. 589 (1967). *Keyishian* dealt with Section 3021 of New York's Education Law and Section 105 of the New York Civil Service Law. These two statutes disqualified from civil service any teaching persons who uttered "seditious" words or did "seditious" acts. The term "seditious" was equated with criminal anarchy as defined by the Penal Law. *Id.* at 598-3. In analyzing the civil service statutes, this Court found that the reference to the Penal Law definition was uncertain, and therefore held the civil service statutes to be unconstitutionally vague. This pronouncement has no effect, however, on the instant prosecution, where the petitioner was tried for his acts under the safeguards and standards of the criminal law. *Cf. Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 69-70 (1963).

In *Keyishian,* a declaratory judgment action, this Court had before it an entire statutory scheme of administrative regulation without benefit of specific application, or of interpretation by the courts of this State. Thus, this Court dealt with all possible ramifications of the civil service statutes, noting the uncertainty as to whether all the provisions of Section 161 of the Penal Law were incorporated into the civil service laws at issue. "If so," this Court noted, "the possible scope of 'seditious' utterance or acts

has virtually no limit.'' For example, citing the least defensible subdivision of Section 161, one not involved in the instant case, this Court referred to the possibility that ''the teacher who carries a copy of the Communist Manifesto on a public street'' could be affected by the wording of subdivision 2 of Section 161 of the Penal Law, as incorporated into the Civil Service Law. This Court concluded that this language had the effect of stiffling the ability of teachers and others to speak freely. *Id.* at 601. This consideration does not apply to the instant case, where a conviction has been obtained under a specific indictment, charging acts which, under any view of the applicable law, could not be constitutionally privileged, and after a trial in which the specific criminal provision under which defendant was indicted [former N.Y. Penal Law, §161(1)] was clearly and narrowly construed by appellate courts previously and by the trial judge in the case at bar. Here, ''the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction.'' *Dennis* v. *United States, supra; cf. Dombrowski* v. *Pfister, supra* at 490-492.

Further, and most significantly, the civil service statutes at issue in *Keyishian* did not simply render removal from public employment contingent on the actual commission of the crime of criminal anarchy; one was subject to discharge merely on ''utterance'' of seditious words or the ''doing'' of seditious acts. This Court was, therefore, concerned with the ''indefinite'' scope of the Penal Law's definition of criminal anarchy [former N.Y. Penal Law §160], when applied to the civil service laws there at issue. ''The teacher,'' this Court stated, ''cannot know the extent, if any, to which a 'seditious' utterance must transcend mere

statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts." *Id.* at 599. But a defendant's seditious intent is a basic element of the crime of criminal anarchy, as is the requirement that the proscribed language constitute a call to illegal action. *Gitlow* v. *New York, supra; Yates* v. *United States, supra.* Thus, in discussing this fatal weakness of the civil service statutes, the *Keyishian* opinion by no means invalidated this State's criminal provisions on sedition.

POINT IV

The conviction for conspiracy to commit the crime of riot did not violate the First Amendment.

Petitioner, turning to the conviction for conspiracy to commit the crime of riot, asserts, as he did in his first petition for certiorari, that this conviction was based entirely on evidence of speech and expression of ideas, and therefore deprived him of freedom of speech. Although considerable conspiratorial conduct proved at trial, such as petitioner's planning to prepare and distribute instructions for making Molotov cocktails, and to intensify the rioting, were not protected speech, substantial proof against the petitioner on this count consisted of his harangues, or of other utterances to which the First Amendment might well apply. However, as the New York Court of Appeals pointed out, the clear-and-present-danger test was satisfied (19 NY2d 496 (1967)); therefore, the First Amendment was not violated. *Yates* v. *United States,* 354 U.S. 298 (1957); *Dennis* v. *United States,* 341 U.S. 494

(1951). The courts below also found that the test had been met.

Furthermore, as was found by the district court,

> "* * *[P]etitioner misstates the facts. As was noted when the case was in the Supreme Court, the evidence in question included evidence of conduct outside the sphere of the First Amendment. See 390 U.S. at 29-30 fn. (Stewart, J., concurring); *id.* at 33 n. 2 (Douglas, J., dissenting). Not only was there such 'unprotected' evidence; it was evidently central to the prosecution's case in terms of emphasis and potential impact on the jury. It included, for example, evidence of Epton's guidance to an assemblage on 'suckering' policemen onto side streets to kill them; his instructions on manufacture and use of weapons for street warfare; his planning of demonstrations and other events, not to convey ideas; but as occasions and techniques for the fomenting of physical violence. These were the kinds of things—evidence of efforts to promote 'guerilla warfare,' 'terrorism,' 'killing'—that were relied upon in page after page of the prosecution's summation, the whole thrust of which was to dispel the claim that Epton had been engaged in peaceful persuasion and to show instead that 'the important evidence' (Tr. 1803) demonstrated Epton's purpose directly and immediately to get people in Harlem to 'start rioting, continue to riot, and * * * keep the situation fired up.' (Tr. 1813). These are the realistically major and critical materials on which the New York Court of Appeals, unanimous in this respect, found the evidence, including words, to establish a '"clear and present danger" of riot.' 19 N.Y. 2d at 507[9]" (Petition, p. 34a).

"9. In his brief to the New York Court of Appeals (p. 69), petitioner insisted that the question of clear and present danger is one 'for the court alone,' and that the trial judge had erred in giving it to the jury."

The court of appeals, after quoting from one of petitioner's speeches about killing and violence, remarked,

> "We have great difficulty with the view that it is improper to use this language as a proof of an overt act in furtherance of a conspiracy to riot" (Petition, p. 9a).

Moreover, Mr. Justice STEWART, in his opinion concurring in the dismissal of Epton's appeal to this Court, and the denial of certiorari, felt that the riot conviction presented no substantial federal question. He found that:

> "* * * the State in these cases presented proof that Epton had actively participated in the formation of a group dedicated to armed revolt against the police under the direction of 'block captains' and with the assistance of 'terrorist bands,' equipped with Molotov cocktails that Epton himself had explained how to use. In the context of this record, activities such as these can make no serious claim to constitutional protection." *Epton* v. *New York,* 390 U.S. 29, 29-30 n. † (1968).

Finally, petitioner adds to his argument in the first petition the claim that the jury had not been warned against convicting him solely on protected speech (Petition, p. 16). This is a point raised by Mr. Justice DOUGLAS in his dissent in *Epton* v. *New York, supra* at 34 n. 2. The district court, however, disposed of Epton's claim by noting that:

> "(1) there is no claim that any such limiting instruction was ever requested;
>
> (2) petitioner never claimed error in the failure to give such an instruction in his brief to the New York Court of Appeals, his petition for certiorari or his jurisdictional statement;

(3) the absence of a request or argument on direct appeal is perfectly understandable since it seems plain that the jury, as a matter of fact, would not have convicted unless it had focussed precisely on the steadily emphasized evidence of unprotected overt acts." (Petition, p. 35a).

The court of appeals agreed "with the district court's ultimate conclusions on these issues" (Petition, p. 8a).

And, as pointed out under Point III, *supra,* the trial court specifically instructed the jury that the petitioner's acts, to be unlawful, had to constitute a clear-and-present danger. Thus, it is inconceivable that the jury, with such instructions, would have convicted the petitioner for his acts, however they are denominated, absent a clear-and-present danger.

POINT V

The petitioner was not denied due process by the court's amendment of the count charging conspiracy to riot.

As originally written, the first count of the indictment, charging the petitioner with conspiracy to riot, alleged that he and others agreed to participate in a riot by promoting and counseling an assembly of more than three persons "which disturbed the public peace by using force and violence to police officers of the City of New York." After all the evidence had been presented and before the summations, the defense argued that the count was fatally defective in that it charged not conspiracy but a completed riot, since it alleged an agreement to instigate riot which actually had "disturbed the public peace * * *" (1675-9). The argument was a semantic one. The court noted, "I am

going to read that language as if it said 'which would disturb' because that's the only way it makes sense" (1679). Then, over defense counsel's frivolous objection that the change was substantial, the court granted the People's motion to amend the count of the indictment reading "which disturbed" to "which would disturb" (1679-80). The petitioner, at the time, made no claim that this change in any way affected the presentation of his case (1679-80, 2048-51), nor does he do so in his present brief.

The petitioner apparently asserts, as he did in his first certiorari petition, that the change harmed him because, as written, the indictment required the People to prove that his acts had actually caused a riot. The authorities he cites in support of his position are not in point. The first count of the indictment, with its specification of fifteen overt acts, clearly charged conspiracy and no other crime. As is well known and well established, the crime of conspiracy connotes conspiratorial acts for future criminal purposes, and phraseology in a conspiracy indictment that indicates that the planned crime has been committed is superfluous. "The overt acts, alleged in an indictment, which constitute a felony may, upon the trial, become immaterial, or the prosecution may be unable to establish them * * * Nevertheless, there may be a conviction if some overt act charged is established. In such a case the offender can be punished for the crime of conspiracy." *People* v. *Tavormina,* 257 N.Y. 84, 93 (1931). "A conviction for the conspiracy may be had though the substantive offense was completed." *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946). As was stated by the district court, the trial judge's verbal change merely made "somewhat clearer this elementary distinction" (Petition, p. 33a). The court of appeals found

that it was "a minor change of grammatical tense and clarified the issue for the jury" (Petition, p. 11a). The amendment of the indictment to specify that the object of the conspiracy lay in the future constituted, therefore, merely a minor change of grammatical tense, in no way affecting the proof of the crime or otherwise prejudicing the defense. N.Y. Code Crim. Proc. §§285, 293. It was wholly permissible by federal standards because it narrowed the issue that the petitioner was called on to meet. *Thomas* v. *United States,* 398 F.2d 531, 539 (5th Cir. 1967). As found by the court below, "[e]ven if the indictment had not been clarified, Epton could properly have been convicted of conspiracy[14]" (Petition, pp. 11a-12a).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1971

"14. Of course, well before this ruling was made, the substantive charge of riot against Epton had already been dismissed by the trial judge, thereby eliminating any confusion of the issue submitted to the jury on the conspiracy to riot count."